



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 31, 2005

Ms. Luz E. Sandoval Walker
Assistant City Attorney
City of El Paso
2 Civic Center Plaza, 9th Floor
El Paso, Texas 79901

OR2005-00877

Dear Ms. Walker:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 218022.

The El Paso Police Department (the "department") received three requests from the same requestor for a copy of a Silver Badge newsletter, the department's use-of-force policy, specified 9-1-1 call tapes and transcripts, and information that pertains to named officers, including officer notebooks and internal affairs investigations of the officers. You state that the requested notebooks no longer exist.¹ You also state you have released some of the requested information, but claim that some of the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

¹A governmental body is not required under the Act to disclose information that does not exist when a request for information is received. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.-San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (interpreting predecessor statute).

²You inform us that the department is "seeking clarification on one of the requests submitted." However, you did not identify the information at issue in the request for clarification or submit it to us for review. Accordingly, should the requestor respond to the request for clarification, we agree that the department must seek a ruling from this office before withholding any responsive information from him. See generally Open Records Decision No. 633 (1999) (providing for tolling of ten-business-day deadline to request attorney general decision while governmental body awaits clarification).

Initially, you inform us that you have released a redacted copy of the department's use-of-force policy. We note that the redacted portions of the requested use-of-force policy are the subject of an open records ruling previously issued by this office. In Open Records Letter No. 2004-10508 (2004), we concluded that this information is excepted from public disclosure under section 552.108(b)(1). As we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, you may continue to rely on the prior ruling as a previous determination and withhold or release the information at issue in accordance with section 552.108. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note that you did not submit the requested Silver Badge newsletter. You assert that the newsletter "is not a document prepared by the City." However, we note that the Act is applicable to "public information." *See* Gov't Code § 552.021. Public information is defined as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a)(1). Thus, virtually all information in the physical possession of a governmental body consists of public information that is encompassed by the Act. *Id.*; *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Accordingly, if the requested newsletter was in the possession of the department when the request for information was received, it is public information subject to release under the Act. As you have not submitted the newsletter for our review, it must be released to the requestor. *See* Gov't Code §§ 552.301(a), 552.302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

You assert that some of the submitted information is excepted under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 261.201 of the Family Code provides as follows:

The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201. Some of the information in Exhibit H consists of files, reports, records, communications, or working papers used or developed in an investigation under chapter 261; therefore, this information is within the scope of section 261.201 of the Family Code. You have not indicated that the department has adopted a rule governing the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, the information at issue is confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). Accordingly, the department must withhold this information, which we have marked, under section 552.101 of the Government Code as information made confidential by law.

Section 552.101 also encompasses chapter 772 of the Health and Safety Code, which relates to local emergency communications districts. Section 772.318 applies to an emergency 9-1-1 district established in accordance with chapter 772, and makes confidential the originating telephone numbers and addresses of 9-1-1 callers that are furnished by a service supplier. *See* Open Records Decision No. 649 (1996). You state that the City of El Paso is part of an emergency communication district that was established under section 772.318.³ Accordingly, we agree that the department must withhold the telephone numbers and addresses of 9-1-1 callers obtained from a 9-1-1 service supplier in Exhibit D, which you have highlighted in yellow, under section 552.101 of the Government Code in conjunction with section 772.318.

You assert that some of the remaining information at issue is excepted under section 552.108 of the Government Code. Section 552.108(a) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You state that the information in Exhibits C, E, and G, and the remaining information in Exhibit H pertain to both an administrative investigation conducted by the department’s internal affairs division and a criminal investigation. The criminal investigation involves the same incident and subject matter as the internal affairs investigation. You inform us that the

³Section 772.318 applies to an emergency communication district for a county with a population of more than 20,000. *See* Health & Safety Code § 772.314(a).

information collected in the course of the criminal investigation is also contained in the internal affairs investigation.

After review of your arguments and the submitted information, we find you failed to establish that the release of some of the information in Exhibit C, which we have marked, would interfere with the detection, investigation, or prosecution of crime. Accordingly, the department may not withhold this information under section 552.108. However, based on your representations, we find that release of the remaining information at issue in Exhibits C, E, G, and H would interfere with the detection, investigation, or prosecution of crime. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ *ref'd n.r.e.*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). We therefore agree that section 552.108(a)(1) is applicable to this information. See Open Records Decision No. 350 at 3-4 (1982) (if complaint against police officer that may result in criminal charges is under active investigation, information may be withheld under statutory predecessor during pendency of investigation); cf. *City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App. 2002, no pet.); Open Records Decision No. 562 at 10 (1990); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution).

However, we note that section 552.108 does not except basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle*. Thus, with the exception of basic front page offense and arrest information that is not otherwise confidential, you may withhold the remaining information at issue in Exhibits C, E, G, and H from disclosure based on section 552.108.

We note that the remaining information contains a social security number, which may be excepted from disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). See Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. See *id.* We have no basis for concluding that the social security number in the remaining information is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

Finally, you assert that some of the remaining information is excepted under section 552.130 of the Government Code. Section 552.130 provides in relevant part the following:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code §552.130(a). We agree that the department must withhold the Texas motor vehicle record information in Exhibit F, which you have highlighted in yellow, under section 552.130.

To conclude, the department may continue to rely on Open Records Letter No. 2004-10508 (2004) as a previous determination and withhold or release the information at issue in the use-of-force policy in accordance with section 552.108. The department must release the requested Silver Badge newsletter if it was in the possession of the department when the request for information was received. In addition, the department must withhold pursuant to section 552.101 of the Government Code (1) the marked information in Exhibit H that is confidential under section 261.201 of the Texas Family Code and (2) the marked telephone numbers and addresses of 9-1-1 callers obtained from a 9-1-1 service supplier in Exhibit D that are confidential under section 772.318 of the Health and Safety Code. With the exception of (1) the information in Exhibit C we have marked to be released and (2) basic front page offense and arrest information that is not otherwise confidential, the department may withhold the remaining information at issue in Exhibits C, E, G, and H from disclosure pursuant to section 552.108. A social security number may be confidential under federal law. Finally, the department must withhold the marked motor vehicle record information in Exhibit F under section 552.130. The department must release the remaining information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).


If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,


James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 218022

Enc. Submitted documents

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(w/o enclosures)